

Office of the Chairman - Northern Territory Statehood Steering Committee

**Submission to the Senate Select Committee Inquiry
on the Reform of the Australian Federation from the
Northern Territory
Statehood Steering Committee**

***Statehood for the Northern Territory: An opportunity
for the Terms and Conditions of Statehood to inform a
better model for Federal / State relations***

Statehood for the Northern Territory: An opportunity for the Terms and Conditions of Statehood to inform a better model for Federal / State relations

The Northern Territory Statehood Steering Committee (SSC) makes 12 distinct submissions in the conclusion to this document, all of which are supported by analysis contained in the following sections:

1. s.121 The Australian Constitution
2. The Limitations of Self Government
3. Responsible Commonwealth Ministers
4. Statehood Steering Committee Submission to Previous Inquiries
5. 'New Federalism'
6. The Demise of the States?
7. Commonwealth/State Tensions
8. Commonwealth/Territories Tensions
9. Land Matters
10. National Parks
11. Minerals
12. Industrial Relations
13. Conclusions

INTRODUCTION

The purpose of this submission is to examine the opportunity Northern Territory Statehood may provide to influence the Federal reform agenda.

The Northern Territory Statehood Steering Committee (SSC) takes the view that Statehood for the Northern Territory provides an opportunity for the reform of relations between the three spheres of Australian government and to influence an agenda for national reform.

1. S.121 of the Australian Constitution

New States may be admitted or established under s.121 of the Australian Constitution or by using s.128 of the Australian Constitution to hold a national referendum.

Section 121: *The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament as it thinks fit.*

The section gives the Commonwealth a very broad power using ordinary legislation to create or admit a new State and decide the terms and conditions upon which that new State may be permitted to be part of the Australian Federation as it 'thinks fit.'

The Statehood Steering Committee submits that the application of s.121 is directly relevant to the Select Committee's reference because s.121 gives the Commonwealth a unique opportunity to negotiate a position with the Northern Territory that allows each jurisdiction to concentrate on what it does best and to settle a model that might influence best practice in the broader application of Australian federalism for years to come.

2. The Limitations of Self Government

Limited self government was granted to the Northern Territory from July 1 1978 by an ordinary law of the Commonwealth Parliament subject to change or repeal at any time. Since then, the *Self Government Act* has been changed on numerous occasions.

Some of these are consequential changes, such as the 2006 Work Choices policy legislation which also amended the *Self Government Act* to give the policy effect in the Northern Territory. In 2009 this was superseded by Fair Work Australia.

The *Northern Territory (Self-Government) Regulations 1978* at Regulation 4 spell out the matters in respect of which Ministers of the Territory have executive authority under section 35 of the *Northern Territory (Self-Government) Act 1978*.

The passage of an amending act in 1997 to insert s.50A into the *Northern Territory (Self Government) Act* is an example of a direct intervention to overturn Northern Territory made law.

In that instance the Commonwealth Parliament changed the *Self Government Act* to neuter the Northern Territory's *Rights of the Terminally Ill Act* and created an ongoing

prohibition so the Northern Territory Parliament may not re-enact such a euthanasia law.

The passage of the *Commonwealth Radioactive Waste Management Act* in 2005 overrode a Territory law prohibiting the transport and storage of radioactive waste in the Northern Territory.

In August 2007, legislation was passed to support the Commonwealth Government's intervention into 73 Aboriginal Communities in the Northern Territory .

The SSC submits that the settling of the terms and conditions of future Northern Territory Statehood will increase certainty and promote better cooperation in the federal system.

3. Responsible Commonwealth Ministers

On August 11 1998 the then Minister for Territories, Mr Alex Somlyay, addressed the Northern Territory Legislative Assembly about the Commonwealth's plans for Statehood in the Northern Territory.

I assure all members and all Territorians that any terms and conditions of statehood will be subject to full consultation and negotiation. As honourable members will be aware, there are many conflicts and sensitive issues that need to be debated and negotiated as we enter this final phase. These are issues such as Aboriginal land rights, the payment of mining royalties, the ownership of uranium, environmental control of uranium mining, the management of the 2 Commonwealth national parks, industrial relations powers, Senate representation and the future government's arrangements for the Indian Ocean territories.

There has been little public comment on Statehood by the Commonwealth since that time.

Then Northern Territory Minister for Statehood, the Hon Syd Stirling MLA and the then Shadow Minister for Statehood, Mr Terry Mills MLA¹ travelled to Canberra on 6 February 2007 to meet with then Commonwealth Attorney General the Hon Philip Ruddock MP and then Minister for Territories the Hon Jim Lloyd MP to commence discussions with the Commonwealth Government on the terms and conditions of Northern Territory Statehood under s.121 of the Australian Constitution.

Mr Ruddock indicated the Northern Territory needs to drive the process and the Commonwealth will need to be convinced that the Northern Territory wants Statehood.

During July 2008 the then Commonwealth Minister for Home Affairs the Hon Bob Debus MP attended the launch of a Statehood awareness campaign in Darwin in conjunction with 30 years of Self Government where he restated the view that the people of the Territory need to demonstrate their support for Statehood and then the Commonwealth will commence engagement on the matter.

At the time of writing, the Commonwealth Attorney General is the Hon Robert McClelland MP and Territories responsibility comes within the portfolio of the Minister for Home Affairs (Hon Brendan O'Connor MP). Former Statehood Steering

¹ Who was also a member of the Statehood Steering Committee at the time.

Committee Chairman Hon Malarndirri McCarthy MLA is the Minister for Statehood in the Northern Territory.

A general election occurs the day after submissions to this Inquiry close. However, it is apparent that no matter which party is in power, the Commonwealth Government has a fairly consistent view that the Northern Territory needs to demonstrate a desire by its voting residents that they want Statehood.

The Statehood Steering Committee submits that gauging this interest would be assisted by the publication of a framework of the terms and conditions for Northern Territory Statehood and that a draft model could in fact be a template for better federalism in the longer term.

4. Statehood Steering Committee Submission to Previous Inquiries

At its meeting on 1 March 2006 the Legislative Assembly Standing Committee on Legal and Constitutional Affairs requested the Northern Territory Statehood Steering Committee prepare a submission to the House of Representatives Committee on Legal and Constitutional Affairs in relation to the House of Representatives Standing Committee on legal and Constitutional Affairs' reference on the Federal implications of Statehood for the Northern Territory.

The Statehood Steering Committee took the following positions:

1. The Northern Territory is not democratically governed because of the ability of the Commonwealth to override decisions of an elected Northern Territory Government.
2. Statehood for the Northern Territory must mean **eventual** equality with the existing States. Anything less than an equal partnership with the other States in the federation would be unacceptable to most Territorians.
3. Territorians want to know exactly what they would be agreeing to in any future plebiscite or referendum about Statehood.
4. An agreed process to determine any terms and conditions is important and should be adopted. The process should include realistic time frames for planned outcomes. Such an agreement will assist the Northern Territory to make budget allocations for timely education programs, plebiscites and other requirements and will identify benchmarks against which citizens may assess the progress being made. The previous Northern Territory Committee recommended the negotiation process should go hand in hand with Territory constitutional development.
5. The SSC wants the Commonwealth to be clear about its intentions for Northern Territory Statehood. Does the Commonwealth agree the Northern Territory should become a State? There is no point raising awareness and expectations of Territorians if there is nothing to be gained.

It is apparent the Commonwealth anticipates there will be some terms and conditions differentiating the Northern Territory from the original States, yet the Commonwealth have not disclosed any detail.²

5. 'New Federalism'

Statehood for the Northern Territory represents a key opportunity for the people of the Northern Territory to test the Commonwealth Government on productive partnerships in the Australian federal system based on an informed policy position developed by the Commonwealth and made known to all Australians about what the terms and conditions of Northern Territory Statehood would be.

Federalism works and works well when it is allowed to promote regional and local solutions for local and regional problems and allows policy innovation to flourish within a unified but diverse structure.

Deciding who does what best and how the States and the Commonwealth determine their roles and responsibilities is a key opportunity provided by our consideration of Statehood.

The Secretary of the Commonwealth Attorney Generals Department, Mr Roger Wilkins a former senior executive with *CitiGroup* and a member for the Forum of Federations³ wrote in October 2007:

Currently the roles and responsibilities of federal and state levels of government are unclear. This is a function of two long term trends. First in a series of decisions the High Court has removed any real restrictions or limits on Commonwealth power...Second, politicians, both state and federal have not been prepared to address this issue in any sort of principled or systematic way⁴.

Mr Wilkins advocated a process for clarifying the role through concerted policy action at the Council of Australian Governments (COAG) level rather than a more abstract 'grand plan'. The principle that government is accessible and accountable to those affected by its decisions should have a key role to play in determining who is responsible for service delivery.

The Statehood Steering Committee sees this as a key part of the Territory taking responsibility at the local level in the devolution of some federal powers to the Territory level upon Statehood, whilst at the same time building on the principle of working cooperatively.

Professor Anne Twomey says Australians have been brought up to regard federalism as an archaic, inefficient and uncompetitive encumbrance that is holding us back economically and socially, yet elsewhere in the world federalism is considered flexible and competitive in a global economy⁵.

² Media Release issued by the Prime Minister on 11 August 1998 *Statehood for the Northern Territory* which states: "The Federal Government has agreed in principle that Statehood should be granted to the Northern Territory, subject to terms and conditions to be determined by Federal Parliament."

³ International think tank based in Ottawa Canada www.forumfed.org

⁴ Australian Review of Public Affairs University of Sydney
www.australinreview.net/digest/2007/election/wilkins.html 10 October 2007.

⁵ Anne Twomey *Federalism – The Good, the Bad and the Opportunities* Australian Policy On-Line 26 April 2007.

The key to good federalism is to satisfy local needs in a cohesive and efficient structure. The SSC believes Statehood for the Northern Territory will strengthen Australia's federalism for the 21st century.

6. The Demise of the States?

Statehood for the Northern Territory provides an opportunity for Territory residents to do something no Australian living today has been able to do. - develop our own systems of governance which suit us and the place we live. Recognising the important and vibrant Aboriginal culture of this place, and working together to realise this great opportunity, will have flow on benefits for Australia as a whole.

While looking at new ways we can acknowledge the old ways that have worked well and jettison those that may not have done so. While respecting the existing States and staying within accepted parameters we can build a constitutional framework that is modern and enduring rather than working with that which was handed down from Westminster.

To date we have conducted well over 20 Information Forums, and there has been no clear call to abolish the States. Many people are curious and others are excited by the opportunity we have with Statehood.

The Statehood Steering Committee has been asked on only a few occasions why the Northern Territory would seek Statehood in an increasingly "centrist" environment where it is believed the Commonwealth Government appears to be moving to take over more power from the States.

The simple answer is the Northern Territory aims to be a partner in the *existing* Australian Federation.

Abolition of the States would require enormous and disruptive constitutional shifts and whilst technically feasible, it is unlikely to gain widespread support in the short to medium term. On that basis, the SSC has determined it should work with the structures we have and improve on them.

At the moment the Territories have no constitutional power to be a player in the decisions, negotiations and battles that may see States' powers decrease further in our federal system.

The book *Restructuring Australia*⁶ details a range of plans for the abolition or re-formation of the States. The SSC takes the view that while it is full of interesting suggestions, these can be a distraction from the more urgent priority of addressing the existing concerns arising from the federal system of government now in place.

7. Commonwealth/State Tensions

On 21 August 2007, then Prime Minister Hon John Howard in a key pre-election campaign speech talked about embracing: *a sense of inspirational nationalism to guide relations between different levels of Government in Australia.*⁷

⁶ Citation Needed - Federation Press

⁷ Speech published in the Sydney Morning Herald 21 August 2007: *A New Creed: Nationalism, Aspirations and Fairness*

The *Northern Territory Emergency Response Bill* had only just passed through the Commonwealth Parliament and the action taken to acquire the Mersey Hospital in Tasmania was then very recent.

The hospital takeover and the Commonwealth Intervention in the Northern Territory saw the Commonwealth taking direct service delivery responsibility for a number of services traditionally within the responsibility of the States.

On 3 March 2010 former Prime Minister Rudd announced a new policy on Health that might have required either all States to agree or a referendum under s.128 for the people to give the Commonwealth the power to directly administer hospitals instead of the States. All States except for Western Australia eventually agreed to the proposal and a policy has since been developed to change the funding mix for participating States.

8. Commonwealth/Territories Tensions

During 2005 the Commonwealth legislated to place a radioactive waste facility in the Northern Territory despite Territory law which prohibits such a facility (the *Nuclear Waste Transport Storage and Disposal (Prohibition) Act 2004*).

In March 2010 the Minister for Energy and Resources Hon Martin Ferguson MP announced that the Government would place the facility at Muckaty Station near Tennant Creek. The 2010 change to the Commonwealth law repeals the 2005 Act and designates Muckaty Station as the site for the facility and negates all Territory law that would inhibit that decision.

It is understood that Statehood may not prevent radioactive waste being placed in a State; however States may have some capacity to prevent the storage of overseas waste on their land⁸.

In May 2006, the Australian Capital Territory legislated to recognise same sex relationships. The Commonwealth soon after had the ACT legislation disallowed by the Governor General.

A further attempt at a modified Bill in 2007 was abandoned by the ACT Assembly after the Commonwealth told them it would respond in the same manner. The ACT argued their approach did not mimic marriage and the ACT Government argued that they had disclosed to the electorate their intentions to legislate to recognise same sex relationships prior to the previous ACT general election.

During 2006 a proposal that the administrative arrangements for Norfolk Island would see Islanders paying tax and losing their duty-free status was considered. In 2010 a Commonwealth Bill passed to limit Norfolk Island Self Government. The new Act implements some of the proposed 2006 reforms.

The *Northern Territory National Emergency Response Act 2007* is an example of not negotiating a position where the jurisdictions are able to determine who does what best. Instead it cemented Commonwealth powers over a range of normally State-like functions in the Northern Territory.

The legislation required Territory public servants to be subject to direct control by the Commonwealth as well as by their Territory masters.

⁸ See Statehood Steering Committee Fact Sheet 22 at www.statehood.nt.gov.au (publications)

The legislation is a clear take-over of responsibility that the Commonwealth could not so easily undertake in a State. As the then Prime Minister said the day after the announcement: *Why now and why in the Northern Territory?because we can*⁹.

Some members of the SSC have expressed concern that the Commonwealth intervention using the *Northern Territory National Emergency Response Act 2007* was an inefficient approach to addressing the critical matters of concern within the Northern Territory and has not yielded the policy outcomes that were used to justify the approach.

The SSC further submits the Commonwealth should take account of local election commitments and results before overriding State or Territory Law.

9. Land Matters

The Northern Territory Government in its 1989 submission to the Commonwealth on the further transfer of power to the Northern Territory took the view that all land held by the Commonwealth in the Northern Territory should be transferred to the Northern Territory Government at no cost with the Commonwealth only retaining land as agreed between the parties where it was required for Commonwealth purposes¹⁰.

There has also been a long history of discussion about which jurisdiction should exercise legislative power over Aboriginal land currently administered under the *Aboriginal Land Rights (Northern Territory) Act (ALRA)*.

During the 1980s the then Northern Territory Government published an options paper entitled *Towards Statehood: Land Matters upon Statehood*¹¹ which reflected their policy of patriation¹² of the ALRA upon Statehood.

Aboriginal organisations in the Northern Territory, particularly the Land Councils, have indicated to the SSC the 1998 *Indigenous Constitutional Strategy Document*¹³ arising from the Aboriginal Constitutional Conventions at Kalkaringi and Batchelor is a living document.

Yet many people attending the Information Forums have said they are open to further constructive discussion about where Aboriginal Land administration should reside in the future.

As part of discussions and the 2010 public forum campaign the SSC is informing people how the system works now and we clearly state that whether the ALRA will come under the administration of the Territory upon Statehood is not yet settled.

⁹ See Statehood Steering Committee Newsletter no 2 July 2007. www.statehood.nt.gov.au (publications)

¹⁰ Background Brief refers to Page 67 of the *1996 Report* by the Working Group (NT) looking at Terms and Conditions of Statehood

¹¹ Northern Territory Government, November 1986

¹² The term patriation is used to indicate the natural 'home' of the law is the Northern Territory, however it cannot be 're-patriated' as it has never been part of the local law.

¹³ Indigenous Constitutional Strategy Northern Territory, Incorporating: The Kalkaringi Statement; Constitutional Convention of the Combined Aboriginal Nations of Central Australia, Kalkaringi 17-20 August 1998 and Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development Northern Territory Indigenous Constitutional Convention, Batchelor College 30 November – 4 December 1998. Published 1999 by ATSIC, the Central Land Council and the Northern Land Council.

10. National Parks in the Northern Territory

While the Northern Territory Government controls and operates approximately ninety national parks, the Commonwealth controls and maintains two of the most famous and iconic national parks in the Northern Territory - Kakadu and Uluru-Kata Tjuta National Parks.

Outside of Jervis Bay, these are the only national parks, under the direct administration of the Commonwealth on the Australian mainland.

Leasing agreements are currently in place between traditional owners and the Commonwealth to allow the land in question at Kakadu and Uluru to be operated as National Parks. The transfer of the lease agreements and ongoing maintenance is a matter for discussion in the context of Northern Territory Statehood.

It is apparent the Commonwealth could enact laws for the conservation and protection of much of the natural environment and Aboriginal heritage in existing parks supported by various heads of Commonwealth power, particularly ss.51(i), 51(xx), 51(xxvi) and 51(xxix) of the Constitution, but it seems this would probably not extend to ongoing management of national parks in a future State unless included in the terms and conditions.

The SSC believes the Northern Territory should be treated the same as the existing States in this regard.

The Commonwealth needs to determine whether it wishes to retain control over the two subject national parks as a term or condition of Northern Territory Statehood or whether it would transfer the land held on its behalf by the Director of National Parks to the Northern Territory along with the assignment of any lease from traditional owners.

11. Minerals in the Northern Territory

Mining earns more than any other industry in the Northern Territory. Mining in the Territory is a growth industry and provides direct employment for many thousands of people. Indirectly, mining is estimated to provide more than 10,000 jobs.

The *Mineral Royalty Act* (NT) levies a royalty on mineral commodities that applies to most mines and mineral commodities in the Northern Territory with the exception of quarries for extractive minerals, uranium mines and mines operating under specific royalty agreements. Mining royalties in the NT are a flat 20% of profits not 'ad valorem' as in other jurisdictions. With various tax deductions, criticism has been levied in the past that some miners may be able to avoid paying royalties by never making a 'profit'.

The Commonwealth's proposed profits tax regime is the subject of election debate at the time of the writing of this paper and the outcome of the election will decide whether a new tax is levied on mining profits nationally.

Mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* and regulations and or rights in respect of Aboriginal land under the

*Aboriginal Land Rights (Northern Territory) Act 1976*¹⁴ are expressly reserved powers still held by the Commonwealth.

Minerals as they occur in the two Commonwealth controlled national parks and minerals as they occur on Aboriginal land are also matters to be resolved in the context of Northern Territory Statehood. Because much of the currently known uranium ore bodies in the Northern Territory are on Aboriginal land, there is a direct link between the ownership of the land, the royalties, the decision making to mine and the terms and conditions of Statehood.

The future administration of the Alligator Rivers Region, (ARR) now primarily under Commonwealth administration is an integral part of that consideration.

So long as day to day administration and environmental control over uranium mines in the Northern Territory falls under the Territory Government and the final power to mine or not is reserved to the Commonwealth, confusion will prevail in these vital matters. The SSC submits this confusion is bad for business, prosperity and potential growth.

The Commonwealth retains all minerals not just uranium in the ARR, whereas the Territory controls other minerals occurring elsewhere in the Territory.

There is also potential confusion and blurring of the issues¹⁵ associated with the proposed placement of a radioactive waste facility in the Territory and the control of uranium mining in the Northern Territory.

The SSC urges the Inquiry to consider how the Commonwealth might engage in discussions with the Territory Government on the future ownership and control of uranium as part of the terms and conditions of Statehood and make clear in advance the Commonwealth's intentions with regard to future ownership of this resource.

12. Industrial Relations

During 2006 the Northern Territory joined other jurisdictions challenging the Commonwealth's use of the Corporations Power under the Australian Constitution to implement the Commonwealth's *Work Choices* reforms.

A change of Government at the Federal level since then means *Work Choices* has been replaced with *Fair Work Australia*, however the Northern Territory remains subject to the Commonwealth's industrial relations system.

In spite of Regulation 4 of the *Northern Territory Self Government Regulations* which says the Northern Territory has competence under s.35 of the *Self Government Act* to have executive authority over "Labour relations (including training and apprenticeship and workers' compensation and compulsory insurance or indemnity therefor)" s.53 of the principle Act, specifies the superior application of the *Workplace Relations Act 1996* (as amended).

¹⁴ Sub Clauses 2(a) and 2(b) of *The Regulations*.

¹⁵ SSC Member Ms Kezia Purick in her former capacity as CEO of the NT Minerals Council discussed the blurring these two issues in a radio interview with Richard Margetson on ABC Radio Darwin (8DDD) on 4 August 2005. Ms Purick is now a Member of the Legislative Assembly and remains an SSC member.

From the Commonwealth's previous approach to these jurisdictional issues it would appear unlikely the Commonwealth would entertain the Northern Territory assuming its own industrial relations regime upon Statehood.

The future of industrial relations in the Northern Territory as a new State would be a matter of government to government negotiations.

13. Conclusion

The Statehood Steering Committee submits:

1. Northern Territory Statehood provides a key opportunity for deciding who does what best and how the States and the Commonwealth might determine their roles and responsibilities.
2. The roles and responsibilities of Federal and State levels of government must be made clearer. COAG should undertake this role with a dedicated timeframe to arrive at an agreed framework model.
3. The Commonwealth Government should use the opportunity presented by a detailed consideration of s.121 terms and conditions to inform the COAG design of a negotiated model as a blueprint for reform with the existing and future States.
4. Federalism should encourage the promotion of regional and local solutions for local and regional problems.
5. The Commonwealth should in conjunction with the Northern Territory Government develop a draft document for publication and consultation outlining the proposed terms and conditions for Northern Territory Statehood.
6. Respect for institutions should be enshrined in an agreement between the States and the Commonwealth or be put to a future constitutional referendum to recognise policy innovation can flourish and to promote a best practice culture within a unified but diverse structure.
7. There is no need to abolish the States. The Information Forums held so far have not demonstrated any appetite for this approach. An argument that historical colonial boundaries could be replaced with more sensible geographical boundaries or those based on a community of interest assumes agreement on such boundaries is available.
8. Federalism works well when it is allowed to promote regional and local solutions for local and regional problems and allows policy innovation to flourish within a unified but diverse structure. Some of the members of the SSC have a firm view that the Commonwealth intervention in 2007 was an inefficient approach to addressing the critical matters of concern within the Northern Territory and has not yielded the policy outcomes that were used to justify the approach.
9. The Commonwealth should specifically take account of local election commitments and results before overriding State or Territory Law.

10. So long as day to day administration and environmental control over uranium mines in the Northern Territory falls under the Territory Government and the final power to mine or not is reserved to the Commonwealth, confusion will prevail in these vital matters. This confusion is bad for business, prosperity and potential growth.
11. The Inquiry should consider how the Commonwealth might engage in discussions with the Territory Government on the future ownership and control of uranium as part of the terms and conditions of Statehood and make clear in advance the Commonwealth's intentions with regard to future ownership of this resource.
12. The Commonwealth should also provide clarity around land matters and land administration in the Northern Territory and this must include significant consultation with Aboriginal Territorians.

Northern Territory Statehood Steering Committee:

Members

Hon Jane Aagaard MLA (Chairman)
Fran Kilgariff (Co Chair)
Kezia Purick MLA
Marion Scrymgour MLA
Daniel Bouchier
Luke Bowen
Kathleen Chong-Fong
Wayne Connop
Brian Martin AO MBE
Jenny Medwell OAM
Irene Nangala
Harry Nelson
Sean Parnell
Jamey Robertson
Bronwyn Russell
Maurie Ryan Japarta
Peter Schaefer
Matthew Storey
Margaret Vigants
Bob Wade
Ray Wooldridge
Wali Wunungmurra

Contact

The Committee Secretary

GPO Box 3721

Darwin 0801

Telephone 1800 237 909

Email statehood@nt.gov.au

Websites

www.statehood.nt.gov.au

www.ntstate7.com.au